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नई दिल्ली, शनिवार, सितम्बर 12, 1987/भाद्र 21, 1909

No. 27]

NEW DELHI, SATURDAY, SEPTEMBER 12, 1987/BHADRA 21, 1909

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में
रखा जा सके

Separate Paging is given to this Part in order that it may be filed as
a separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii)
PART II—Section 3—Sub-section (iii)

(संघ राज्य क्षेत्र प्रशासनों को छोड़कर) केन्द्रीय अधिकारियों द्वारा जारी किए गए आदेश और अधिसूचनाएँ
Orders and Notifications issued by Central Authorities (other than Administrations of Union Territories)

भारत निर्वाचन आयोग

नई दिल्ली, 21 अगस्त, 1987

आ. अ. 99:—1986 की निर्वाचन अर्जों संख्या 1 में मद्रास उच्च न्यायालय के तारीख 24 अप्रैल, 1987 के निर्णय को लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में निर्वाचन आयोग इसके द्वारा प्रकाशित करता है।

[संख्या 82/तमिलनाडु-रा.स./1/86/87]

आदेश से,

सी० एल० रोज, सचिव

ELECTION COMMISSION OF INDIA

New Delhi, the 21st August, 1987

O.N. 99.—In pursuance of section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission hereby publishes the judgement of the High Court of Judicature at Madras dated 24th April, 1987 in Election Petition No. 1 of 1986.

[No. 82/TN-CS/1/86/87]

By order,

C. L. ROSE, Secy.

IN THE HIGH COURT OF JUDICIATURE AT MADRAS
ORIGINAL JURISDICTION

Friday, the 24th day of April, 1987

THE HONOURABLE MR. JUSTICE S. A. KADER
ELECTION PETITION NO. 1/1986

Era Sezhiyan

... Petitioner

—Vs.—

1. T. R. Balu
2. R. T. Gopalan
3. G. Swaminathan
4. M. Palaniyandi
5. M. Vincent
6. Jayanthi Natarajan
7. Anakaputhur C. Ramalingam
8. The Returning Officer for the Election for the council of States 1986 Tamilnadu ... Respondents.

Petition under Section 81, 84 read with Sections 100(1) (d)(iii) and (iv) and 101(a) of the Representation of the People Act 1951 praying for an order (a) to set aside the declaration of results of elections to the Rajya Sabha as announced by the 8th respondent; (b) to produce inspect re-examine, recount and rescrutinise of all the ballot papers polled at the election and reject such of those ballot papers

which were improperly received in favour of the 1st respondent; (c) to re-examine and recount of the rejected and invalid votes and allot to the account of this petitioner one vote marked as first preference vote in favour of this petitioner which was improperly rejected; (d) to declare the election of the first respondent as void; (e) to declare that this petitioner as having been duly elected by the elected members of this Tamilnadu Assembly in the poll conducted on 28-6-1986 to fill one of the six seats in the Rajya Sabha and (f) to direct the respondents to pay costs of this petition.

This Election Petition coming on before this Court for hearing on Friday the 3rd, Monday the 6th, Wednesday the 15th and Thursday the 16th days of April, 1987 and having stood over for consideration till this day the Court delivered the following Judgement :—

This is an Election Petition under Sections 81 and 84 read with section 100(1)(d)(iii) and (iv) and 101(a) of the Representation of the People Act of 1951 to declare as invalid the election of the first respondent in the election of six members to the Rajya Sabha by the elected members of the Tamil Nadu Legislative Assembly held on 28th June, 1986 and to declare that the petitioner as having been duly elected in the said election.

2. The brief facts of the case of the petitioner are these :

(a) The election of six members to the Rajya Sabha by the elected members of the Tamilnadu Legislative Assembly was held on 28-6-1986. The petitioner and the respondents 1 to 7 were the eight candidates in the field, all their nominations having been found valid. The 8th respondent was the Returning Officer. The polling took place as scheduled on 28-6-1986 and immediately thereafter, the ballot box was opened and the votes were sorted out in the order of first preference votes. The following were the particulars of the first preference votes secured by the candidates :—

Candidates	First preference votes.
1. Petitioner	33
2. 1st respondent	35
3. 2nd respondent	31
4. 3rd respondent	33
5. 4th respondent	32
6. 5th respondent	34
7. 6th respondent	34
8. 7th respondent	Nil

Out of the 33 first preference votes cast in favour of the petitioner, one ballot paper was rejected by the 8th respondent-Returning Officer on the ground that in the said ballot paper the first preference was marked otherwise than with article supplied for the purpose. According to the working result sheets of the counting as maintained and announced by the 8th respondent, the following were the particulars of votes secured by each candidate at the end of the counting :

1. Petitioner	3219
2. 1st respondent	3301
3. 2nd respondent	3270
4. 3rd respondent	3300
5. 4th respondent	3301
6. 5th respondent	3301
7. 6th respondent	3301
8. 7th respondent	Nil

In consequence, the 8th respondent declared respondents 1 to 6 as having been duly elected.

(b) It is the case of the petitioner that 3 out of 35 first preference votes cast in favour of the first respondent were invalid as those ballot papers did not contain the figure '1' in the space intended for the purpose. According to the petitioner, the form, the design of the ballot paper and the particulars contained therein indicated clearly that the space

especially allotted opposite the name of the candidate in the ballot paper is the space where the elector has to indicate his vote of preference by numericals, as seen from Rule 37A introduced by Rule 70(b)(ii) of the Conduct of Elections Rules, 1961. As the 3 ballot papers out of the 35 first preference votes cast in favour of the first respondent contained figure 1 not in the space allotted for the purpose, those 3 ballot papers are invalid and have to be rejected under Rule 73(2)(a) of the Conduct of Elections Rules, 1961. These 3 ballot papers were improperly received by the Returning Officer and the objection raised by the petitioner was overruled by him. The Returning Officer treated these 3 ballot papers as valid by virtue of Rule 71(4) and 73(2) of the Conduct of Elections Rules, 1961. The order of the 8th respondent-Returning Officer is in violation of the provisions of the Conduct of Elections Rules. The instructions issued by the 8th respondent-Returning Officer to the electorate, true copy of which is enclosed as Annexure IV to this petition, laid down that "A ballot paper shall be invalid if the figure 1 is not marked in the space set apart for marking the order of preference". The Returning Officer failed to follow his own aforesaid instruction. It is further alleged by the petitioner that the 3 electors by marking the figure not in the space allotted therefore, but in the compartment where the name of the 1st respondent is found, have exposed themselves to be identified and on this ground also these ballot papers must have been declared invalid under Rule 73(2)(d) of the Conduct of Elections Rules. By reason of the improper reception of these 3 ballot papers, the result of the election has been materially affected. If these 3 ballot papers had been rejected, the first respondent would have secured only 32 first preference votes and this petitioner having secured 33 first preference votes would have been declared as elected.

(c) The next ground of attack is that one of the ballot papers in which the first preference has been marked in favour of the petitioner has been improperly rejected by the 8th respondent-Returning Officer under Rule 73(2)(e) of the Conduct of Elections Rules, 1961 on the ground that in the said ballot paper the first preference figure 1 has been marked otherwise than with the article supplied for the purpose. The contention of the petitioner is that the 8th respondent should have along with the ballot paper handed over to the elector the article with which he has to mark his preference and after the elector marked his vote and inserted the same into the ballot box, the 8th respondent should have collected back the said article from him and he should have repeated this process for all the electors, who came to vote and this procedure has not been followed by the 8th respondent. Such laxity on the part of the Returning Officer has resulted in the electors using their own article for marking the figure and this is in violation of the statutory order No. 3/71 issued under Rule 30 of the Conduct of Elections Rules, 1961. The 8th respondent has not supplied any article as contemplated by Rule 73(2)(e) of the Conduct of Elections Rules and hence the rejection of the said ballot paper by the 8th respondent is unsustainable and the said ballot paper should have been accepted as valid and counted in favour of the petitioner as first preference vote. If this ballot paper had been received as valid, the petitioner would have secured 33 first preference votes and would have been declared elected. The failure on the part of the 8th respondent to include the said vote in the petitioner's favour has thus materially affected the result of the election.

(d) It is the further case of the petitioner that after the first round of counting of votes was completed, and before the commencement of the transfer of votes, the petitioner requested the 8th respondent-Returning Officer orally and also presented a petition for recounting of all the ballot papers, but, he turned down the request. The 8th respondent is bound under Rule 82 of the Conduct of Elections Rules, 1961 to re-examine and recount the ballot papers. Failure to do so is illegal. If the 8th respondent had conducted re-examination and recounting of the ballot papers, the 3 votes improperly counted in favour of the 1st respondent would have been rejected and the 1 ballot paper which was improperly rejected would have been received in favour of the petitioner as first preference vote, as a result of which the petitioner's total first preference votes would have been 33 as against the first respondents first preference votes of 32 and the petitioner would have been declared elec-

ted as having secured more vote than the first respondent, even without applying the rule of single transferable vote. By failure on the part of the 8th respondent to comply with the mandatory requirements of the provisions contained in Rule 82 of the Conduct of Elections Rules 1961, the result of the election so far as it concerned the returned candidates has been materially affected.

(e) Hence his petition for re-examination, re-counting and re-scrutiny of all the ballot papers, to declare the election of the 1st respondent as void and to declare the petitioner as having been duly elected.

3. The first respondent has raised the following contentions :—

(a) The averments in paragraphs 1 to 7 of the petition which related to facts are admitted as substantially correct.

(b) It is denied that the petitioner secured 33 first preference votes as claimed by him. He secured only 32 first preference votes. The relevant Rules are clear that the vote can be recorded only in the manner prescribed. Sufficient number of ball point pens with an identical colour ink was provided. An elector who purposely avoids using the pen provided and records his vote with his own pen in a different coloured ink cannot be said to have properly recorded his vote. Hence the allegation in para 10 of the petition that one vote cast in favour of the petitioner was improperly rejected by the 8th respondent—Returning Officer, is not correct. All the electors used only the ball point pen provided to record their preference except the one elector who has recorded his first preference with his pen in green ink. There was no laxity on the part of the 8th respondent—Returning Officer. The 8th respondent made no mistake in rejecting that ballot paper in which an elector has marked his preference in favour of the petitioner by using a pen of his own with green ink. The decision of the Returning Officer is correct and the result of the election is not materially affected thereby.

(c) All the 35 votes recorded and accepted in favour of this respondent are valid. The intention of the concerned electors to give the first preference to this respondent is clear as they have indicated their preference on the ballot papers against the name of this respondent. A ballot paper cannot be rejected merely because the preference was indicated against the name of the candidate and not in the separate compartment on the ballot paper. Rule 73(2)(a) of the Conduct of Elections Rules, 1961, cannot be said to have been violated. There was also no mark or writing by which an elector could be identified nor was any figure marked otherwise than with the article supplied for the purpose. This respondent's name being a short one, left enough space in the same compartment on the ballot paper for an elector to record his preference. If an elector so recorded his preference such a ballot paper cannot be rejected as invalid and the Returning Officer acted correctly and legally in refusing to reject these ballot papers, in which the first preference has been cast in favour of this respondent. The Returning Officer by his instructions has no power or jurisdiction to add to or vary the provisions of the Representation of People Act and the rules thereunder. The very purpose of a vote is to indicate the preference and once such preference has been indicated clearly in favour of a candidate such a vote cannot be rejected because of an erroneous and narrow construction of Rule 73(2)(a) of the Conduct of Elections Rules. The Returning Officer has acted correctly and in accordance with the law in accepting as valid the said three ballot papers. Rule 73(2) has in no way been violated. The petitioner's objections are without any legal force or merit. The grounds for rejecting the ballot paper are contained in the Act and the Rules made thereunder and it is not open to the 8th respondent—Returning Officer to give instructions in addition to the specific legal provisions. The very fact that the 8th respondent himself chose to receive the 3 ballot papers as validly cast in favour of this respondent shows that his instructions were purely recommendatory and by no means legally mandatory.

(d) There is also no question of the 3 electors who have recorded their first preference against the name of this respondent being identified. If it was merely a question of an elector being identified, this could be done by placing his mark in any specific corner even within the separate space or indicating his preference in any kind of numeral not necessarily Roman. As a matter of fact, in this very election some voters have recorded their preference by using Roman numerals. The acceptance of the 3 ballot papers in favour of this respondent as first preference votes is not in violation of Rule 73(2)(d) of the Conduct of Elections Rules and the result of the election is not in any way affected.

(e) The averment in paragraph 33 of the petition about the request made by the petitioner for recounting and the rejection of the same by the Returning Officer are correct. But, that does not mean that there is any merit in the petition for recounting. The Returning Officer acts entirely within his jurisdiction in taking a decision whether it was necessary to re-examine and recount the ballot papers and it is incorrect to say that he has no option in the matter. There has been no failure to comply with any of the mandatory provisions of law as alleged. This respondent has no objection at all to this Court inspecting all the votes to appreciate the contentions of the parties but it is submitted that such an inspection is not going to further the case of the petitioner in any manner. There is no merit in the contentions of the petitioner and the petition has, therefore, to be dismissed with costs.

4. The respondents, 2, 3 and 5 have filed a counter to the following effect:

The 8th respondent Returning Officer has rightly rejected the one ballot paper in which the first preference was cast in favour of the petitioner and has rightly accepted the 3 ballot papers in which the first preference was marked in favour of the first respondent. The instructions contained in S.O. 3/71 are only directory in nature and so long as the intention of the voter is clear and he has marked with specific certainty, his vote cannot be invalidated on the ground that the vote was not marked in the space set apart for the purpose. No clause or rule provides that the vote, if not marked in the space specifically allotted for that purpose, has to be considered as invalid. The provisions of Rule 30 of the Conduct of Elections Rules, 1961 and clause 7(iii) and (iv) of S.O. 3/71 do not warrant the construction put forward by the petitioner. The reference to the election to the Legislative Assembly has no relevance to the present election. Rule 73(2), being a penal provision, should be strictly construed and as those 3 ballot papers which are disputed by the petitioner do not fall under any of the categories enumerated under Rule 73(2) of the Conduct of Elections Rules, 1961, the 8th respondent has rightly included them in favour of the 1st respondent. The Returning Officer has rightly rejected the objections preferred

by the petitioner and the petitioner can have no grievance. The contention of the petitioner that Rule 73(2)(a) was not complied with by the 8th respondent is unsustainable. With regard to the instructions given by the Returning Officer it is only in the nature of appraising the electorate and has no legal sanctity. Clause (1) of the instructions issued by the 8th respondent Returning Officer is beyond the scope of the provisions of the Act and the Rules and the Returning Officer has acted beyond the scope of the powers vested in him by the provisions of the Representation of the People Act and the Rules framed thereunder. The petitioner is not, therefore, entitled to invoke the 'instructions' to his assistance. As the ballot papers contained no mark than that stipulated, the contention of the petitioner that the said votes are liable to be rejected under Rule 73(2)(d) is untenable. The 8th respondent has supplied and provided the electors with blue ball point pen and hence factually the petitioner's averments in paras 27 and 28 are not true. Rule 82 of the Conduct of Elections Rules is not mandatory but only directory. The petitioner's request for recount raised the dispute only with regard to the 4 ballot papers and the said dispute having been rightly decided by the Returning Officer, there was no need for ordering recount. No error has been committed by the Returning Officer and the result of the election has not been affected. The petition is, therefore, liable to be dismissed with costs.

5. The fourth respondent has filed a separate counter-statement raising substantially the same contentions as those raised by the respondents 2, 3 and 5.

6. The 6th respondent remains *exparte*.

7. The 7th respondent has adopted the counter statement of the 2nd respondent.

8. The 8th respondent—Returning Officer has filed the following detailed counter:

(a) The averments in paragraphs 1 to 7 of the election petition dealing with the facts of the election held on 28-6-1986 and the details regarding votes secured by the 8 candidates in the said election as set out in the election petition are not disputed. In accordance with the votes secured by them, this respondent declared the respondents 1 to 6 as duly elected and the remaining 2 as not elected.

(b) The Representation of the People Act, 1951 and the rules framed thereunder have been scrupulously followed by this respondent without any tenable cause for complaint from any quarter. The instructions given by this respondent were only guidelines given to the electors. They were only supplemental to the printed copies of the Rules 37A and 39A of the Conduct of Elections Rules, 1961 circulated to the electors.

(c) The allegation that this respondent improperly rejected one ballot paper in which the first preference was marked in favour of the petitioner is not true. As per the instructions contained in item 4 under Sl. No. 22 in the appendix below paragraph 'D' in Chapter IV of the Handbook for Guidance published by the Election Commission of India, ball point pens of blue ink were supplied at this election held on 28-6-1986, for marking the preference by the electors. In one ballot paper which was cast in favour of the petitioner, the figure '1' was marked in green ink. Rule 73(2) of the Conduct of Elections Rules, 1961 enumerates the grounds on which a ballot paper shall be rejected as invalid clause(e) of the said rule specially laydown that a ballot paper shall be invalid on which there is any figure marked otherwise than with the article supplied for this purpose. In view of the above provision the said ballot paper in which preference was marked in green ink was rejected as invalid. The contention of the petitioner in para 27 of his petition that along with the ballot paper the Returning Officer should hand over to the voter the article with which he has to mark his vote and after the elector marks his vote and inserts the same into the ballot box, the Returning Officer should collect back the said article from him and should repeat this process for all the electors who came to vote, is untenable. Unlike the procedure followed in the General Elections, the procedure followed hitherto in the election by the members of the Legislative Assembly is that ball point pens of blue ink are supplied to the electors for marking the preference. The ball point pens are kept inside the voting compartments for the use of the electors. The electors have to proceed to one of the voting compartments and record their preference in accordance with sub-rule (2) of Rule 37A with the article kept inside the voting compartment. In the biennial election held on 28-6-1986 ball point pen of blue ink was kept inside each one of the voting compartments for the use of the electors. Besides the distribution of the instructions contained in Rule 39A of the Conduct of Elections Rules, 1961, that the elector shall record vote in accordance with sub-rule (2) of Rule 37A with the article supplied for that purpose each and every elector was also given instructions orally by the Polling Officer who obtained the voter's signatures in the counterfoil of the ballot paper and also by the Polling Officer who gave the ballot paper to the elector that he should record his vote with the ball point pen kept inside the voting compartment for that purpose. A Polling Officer was also put on duty outside the voting compartment to check up that the ball point pen kept inside the voting compartment was not taken away inadvertently by an elector after recording his vote. Hence the allegation that this respondent has not supplied any article

as contemplated in Rule 73(2)(e) of the Conduct of Elections Rules, 1961, is totally false. There was no laxity on the part of this respondent in making available the instrument for making the preference on the ballot papers. Such laxity was not pointed out either by the petitioner or by any other person at the time of election. This alleged laxity was also not raised by the petitioner in his objections presented to this respondent at the counting. Hence this allegation is only an after-thought and is invented just for the purpose of this election petition. This respondent has acted strictly as per the Rules and the allegations to the contrary are denied. There has been no failure on the part of this respondent. This respondent is not in error in rejecting the said ballot paper as invalid under Rule 73(2)(e) of the Conduct of Elections Rules 1961 as the first preference therein was marked with an article other than that supplied for the purpose. No mistake or failure is caused in this regard by the Presiding Officer or the Polling Officer in the instant case to attract the proviso to Rule 73(2)(e) of the Conduct of Election Rules, 1961.

(d) The allegation in para 12 of the election petition that three ballot papers in which the first preference was cast in favour of the first respondent were liable to be rejected as invalid and were improperly received in favour of the first respondent is incorrect and untenable in law. The first respondent secured 35 first preference votes. As the total value of 3500 credited to the first respondent was greater than the quota fixed viz., 3301 he was declared duly elected. In 3 ballot paper cast in favour of the first respondent the first preference was marked on the left side of the vertical line dividing the column 'name of the candidate' and 'mark order of preference'. As the first preference was not marked in the space under the column mark order of preference objection was taken to their validity by the petitioner. Rule 71(4) of the Conduct of Elections Rules, 1961 defines that the first preference means the figure '1' set opposite to the name of a candidate, the second preference means the figure '2' set opposite to the name of the candidate, the third preference means the figure '3' set opposite to the name of the candidate and so on. In the above three cases as the first preferences were marked opposite the name of the candidate the intention of the voter was clear. Rule 73(2) of the Conduct of Election, Rules, 1961 enumerates the grounds under which a ballot paper shall be rejected and the aforesaid 3 ballot papers did not come under any of the grounds mentioned therein. Accordingly the above 3 ballot papers were held valid. The allegation that they were improperly received is not correct. It is also pointed out that Rule 37A(2)(a) which deals with the method of voting states that an elector in giving his vote shall place on his ballot paper the figure '1' in the space

opposite the name of the candidate for whom he wishes to vote in the first instance. The above Rule merely requires that the preference should be indicated in the space opposite to the name of the candidate. It does not specify that the preference should be set in the column allotted for that purpose. As the first preference in these 3 ballot papers had been made in the space opposite to the name of the candidate and as the intention of the electors was also clear those ballot papers were held valid. Rule 73(2)(d) provides that a ballot paper shall be invalid on which there is any mark or writing by which the elector can be identified. But in the 3 ballot papers in question there was no mark or writing at all excepting the figure '1' and hence they were not invalid under Rule 73(2)(d) of the Conduct of Election Rules and were rightly held valid by this respondent.

(e) It is true that the petitioner gave three objections during the course of the counting of votes. At the time of the sorting of votes one ballot paper cast in favour of the petitioner was rejected because the first preference was marked in it in green ink as already stated. At this stage, the petitioner gave an objection protesting against the rejection of this ballot paper. As the first preference in this ballot paper was marked with an instrument other than the instrument made available for the purpose it was rejected by this respondent under Rule 73(2)(e) of the Conduct of Elections Rules, 1961 and the objections were overruled. The petitioner raised two other objections. One objection petition related to the reception of 3 ballot papers cast in favour of the first respondent in which the first preferences were marked not in the space under the column 'mark order of preference' but opposite to the name of the candidate. This respondent found all the 3 ballot papers valid for reasons already set out in paragraph 8(d) supra and the objection was therefore overruled. The other objection petition was for recounting the ballot papers. It was based on the contention that the 3 ballot papers in which the first preference was not marked in the column under the heading 'mark order of preference' were invalid and no other irregularity was alleged in the counting of votes. No fresh ground was advanced in the third petition for the purpose of recounting. This respondent re-examined the position with reference to the 3 ballot papers reaffirmed their validity for the reasons already stated and rejected the request for recount. In the circumstances, there was absolutely no scope for invoking Rule 82 of the Conduct of Elections Rules. The requirements of Rule 82 have been substantially complied with as the basis on which recount was claimed had been considered and disposed of earlier after careful scrutiny.

(f) There has been no improper reception of votes or improper rejection of any vote. Nor has there been any non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or any rule or order made thereunder and hence the provisions of section 100(1)(d) (iii) and (iv) are not attracted. The result of the election has in no way been affected.

(g) The petitioner has not made out any case for inspection, re-examination, recount or re-scrutiny of all the ballot papers. He has not made out any case for declaring the election of the first respondent invalid or for declaring him as having been duly elected. The petition is bereft of merit and has to be dismissed with costs.

(9) On the above pleadings, the following issues have been framed for trial:

1. Whether the one vote in favour of the petitioner was improperly rejected by the Returning Officer on the ground that it was marked in green ink?
2. Whether the three votes cast in favour of the first respondent were improperly received, even though they were marked outside the square column, but opposite his name?
The following additional issue has been framed on 16-4-1987:
3. Whether the request of the petitioner for recounting has been improperly rejected by the Returning Officer?

10. ISSUE NO 1:—The biennial election of six members to the Council of State by the elected members of the Tamilnadu Legislative Assembly was held on 28-6-1986. The petitioner and the respondents 1 to 7 were the eight candidates in the field for the six seats. The strength of the elected members of the Tamilnadu Legislative Assembly at that point of time was 232. In the election held on 28-6-1986 all the 232 elected members of the Tamilnadu Legislative Assembly exercised their franchise. It is the case of the petitioner that he secured 33 first preference votes, but, the 8th respondent—Returning Officer, improperly rejected one of these ballot papers on the ground that the first preference in favour of the petitioner was marked in green ink i.e., otherwise than with the article supplied for the purpose. The said ballot paper is marked as Ex.C.1. The petitioner filed a written objection before the Returning Officer under Ex.R.2. The 8th respondent—Returning Officer rejected the objection under Ex.R.2(c) order. He held therein that blue ball point pens have been supplied for the electors to mark their preference and as this particular elector has marked his preference with his own pen in green ink, the

said ballot paper is invalid. It is this order that is challenged before me under this Issue.

11. It is admitted on all hands that if Ex.C.1 ballot paper is held valid, the petitioner will be getting 33 first preference votes and will get elected at the cost of the 2nd respondent to this election petition. Hence the validity or otherwise of Ex.C.1 ballot paper is of vital importance.

12. Rule 37A of the Conduct of Elections Rules, 1961 dealing with the method of voting; Rule 39A(2) which deals with the procedure of voting; and Rule 73(2) which lays down the grounds for invalidating a ballot paper are relevant for this purpose and they run as follows :

“37A. Method of voting.

1. Every elector has only one vote at an Election irrespective of the number of seats to be filled.
2. An elector in giving his vote—
 - a. shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance; and
 - b. may, in addition, place on his ballot paper the figure 2, or the figures 2 and 3, or the figures 2, 3 and 4 and so on in the space opposite the names of the other candidates in the order of his preferences.

(EXPLANATION—The figures referred to in Clauses (a) and (b) of this sub rule may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language but shall not be indicated in words.)”

39.A. Maintenance of secrecy of voting by electors within polling station and voting procedure.—(1)...

2. The elector on receiving the ballot paper shall forthwith—

- “a. proceed to one of the voting compartments;
- b. record his vote in accordance with sub-rule (2) of rule 37A with the article supplied for the purpose;
- c. fold the ballot paper so as to conceal his vote;
- d. insert the folded paper into the ballot box; and
- e. quit the polling station.”

“73. Scrutiny and opening of ballot boxes and packets of postal ballot papers.—1...

2. A ballot paper shall be invalid on which—

- a. the figure 1 is not marked; or
- b. the figures 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or
- c. the figure 1 and some other figures are set opposite the name of the same candidate; or

d. there is any mark or writing by which the elector can be identified; or

e. there is any figure marked otherwise than with the article supplied for the purpose;

Provided that this clause shall not apply to postal ballot paper.

Provided further that where the Returning Officer is satisfied that any such defect as is mentioned in this clause has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected, merely on the ground of such defect.

[EXPLANATION—The figure referred to in Clauses (a), (b) and (c) of this sub-rule may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language, but shall not be indicated in words].

13. The 8th respondent was the Returning Officer at this election and he was also the Presiding Officer at the polling station. It is his case that unlike the procedure followed in the elections to the Lok Sabha and State Assemblies the procedure followed hitherto in the election by Assembly members to the Council of States and Legislative Councils is that ball point pens of blue ink are supplied to the electors for marking the votes and they are kept inside the voting compartments for the use of the electors, in accordance with Rule 31(3) of the Conduct of Elections Rules read with Serial No. 22 in the appendix below paragraph D in Chapter IV of the Handbook for Guidance at Biennial Elections and Bye-election to council of States and State Legislative Councils. Rule 31(3) deals with articles necessary for electors to mark the ballot papers, while Serial No. 22 in the above appendix refers to ball point pens specifically. According to the Returning Officer, who was examined as R.W.1, the procedure adopted in this election is briefly as follows :—There were two voting compartments, inside each of which a ball point pen of blue ink was kept. As soon as an elector goes to the polling booth, one polling assistant gives the identity slip and another polling assistant gives to the elector printed copies of Rules 37A and 39A of the Conduct of Elections Rules, Ex.R3, and roneo copy of the guidelines (Ex.R.1) Then the elector goes to the first polling officer, who obtains his signature in the counter-foil of the ballot paper and instructs the elector that he should vote with the instrument kept for the purpose inside the voting compartment. Another polling Officer gives the ballot paper and he again instructs the elector to go into the voting compartment and mark the ballot paper with the instrument kept therefor the purpose, fold the ballot paper before coming out and put it into the ballot box in front of the polling officer. There is stationed at the entrance of the voting compartment a

polling assistant who again reminds the elector that the writing material viz., ball point pen is inside for marking the ballot paper. When the elector comes out, the polling assistant checks whether the writing material is inside the cabin to ensure that it is not inadvertently taken away by the elector. R.W.1 swears that this procedure has been scrupulously followed without any complaint from any quarter. There is hardly any reason to doubt that the above procedure has been followed, especially because there is no evidence contra by any elector who has exercised his franchise in this election.

14. It is not the case of the petitioner either in the objection filed before the Returning Officer under Ex. R2 or even in his election petition that no pen was provided inside the voting compartment for marking the preference in the ballot papers. Nor is it his case that any elector other than the one who has marked his preference in Ex. C1 ballot paper in green ink has exercised his first preference with his own pen. The question of using any article other than that supplied for the purpose of marking the preference is, therefore, confined only to Ex. C1 ballot paper.

15. It is strenuously contended by Mr. Ram Jethmalani, learned counsel for the petitioner that the intentment of the elector who has marked his preference with his own pen in green ink in Ex. C1 ballot paper is clearly and unequivocally in favour of the petitioner and hence Rule 39A(2)(b) and Rule 73(2)(e) of the Conduct of Elections Rules, 1961 should not be construed strictly or pedantically but in a liberal manner and Ex. C1 ballot paper ought to have been accepted as valid. This contention has been answered directly by a seven-Judge Bench of the Supreme Court in *HARI VISHNU KAMATH v. AHMAD ISHAQUE* (A.I.R. 1955 SC. 233). The Supreme Court observed thus :

"That is argued with great insistence that as the object of the Election Rules is to discover the intention of the majority of the voters in the choice of a representative, if an elector has shown a clear intention to vote for a particular candidate, that must be taken into account under section 100(2)(c) even though the vote might be bad for non-compliance with the formalities. But when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a Court of law, in the same position as an intention not expressed at all."

The petitioner cannot, therefore, rely on the intention of the elector to validate Ex. C1 ballot paper.

16. The thrust of the contention of the petitioner is that the particular elector, who has marked his preference in Ex. C1 ballot paper with his own pen in green ink has committed this default because of the mistake or failure on the part of the Presiding Officer or polling Officer in following an erroneous procedure in keeping the ball point pen inside the voting compartment, that proviso (2) to Rule 73(2)(e) of the Conduct of Elections Rules 1961 is, therefore attracted and the Returning Officer ought not to have rejected Ex. C1 ballot paper.

17. Mr. Ram Jethmalani, learned counsel for the petitioner has put forward several grounds for invoking what he calls the curative proviso (2) and contends that the Rule making Authority was conscious that such defect may occur and has hence introduced this bening proviso which has to be interpreted liberally. I shall now deal with his points :

18. The first contention of Mr. Ram Jethmalani is that the language used in Rule 39A(2)(b) and Rule 73(2)(e) of the Conduct of Elections Rules, 1961 is the "article supplied for the purpose", that the word 'supplied' must be construed to mean 'given delivered' or 'handed over' to the elector and not 'provided', kept or 'made available'. According to Mr. Ram Jethmalani, if the ball point pen had been given, delivered or handed over to the elector at the

31. I am fortified in my conclusion by the decision of a single Judge of the Lucknow Bench of the Allahabad High Court in the unreported decision in SHARADAA DEVI v. K. C. PANI (Election Petition No. 2/78 dated 7-4-1983). The learned Judge has held that if the preference is indicated by a voter in the space opposite the name of the candidate but not in the actual column headed as "Adhiman Kram Chiniut Keejiye" (mark order of preference) it will not invalidate the ballot paper and I respectfully agree with this view.

32. It is true that in Ex. R1 stencil instruction given to the electors by the Returning Officer, the English portion reads that the ballot paper shall be invalid if the figure 1 is not marked in the space set apart for marking order of preference. The Tamil portion reads that the ballot paper shall be invalid if figure 1 is not marked in the square (in Tamil) intended for marking the preference. It is clear that the Returning Officer has gone far beyond the scope of the Rules in using the words 'set apart' in the English copy and the word 'in Tamil' (Square) in the Tamil Copy and he has certainly no authority to add one more ground for rejection of a ballot paper. This instruction has no legal force and cannot be pressed into service by the petitioner.

33. Mr. Ram Jethmalani, urged that Exs. C2, C3 and C4 ballot papers are invalid under Rule 73(2)(a) of the Conduct of Elections Rules which lays down that a ballot paper shall be invalid if the figure 1 is not marked. Relying on the language of the Rule 37(2)(a) that an elector shall place on the ballot paper the figure 1, it is contended that unless the elector placed the figure 1 in the column on the right hand side of the vertical line, he cannot be said to have marked the figure 1. I am unable to persuade myself to accept this hyper-technical and hair-splitting argument. In Rule 71(4) the language used is 'set the figure'. The Conduct of Election Rules, 1961, uses the words 'mark', 'place', and 'set' in respect of writing the figure 1 and they denote one and the same thing. There is, therefore, no violation of Rule 73(2)(a).

34. Another contention advanced on behalf of the petitioner is that the 3 ballot papers are invalid under Rule 73(2)(d) as those electors by marking the figure 1 in the same column in which the name of the candidate is found, have exposed themselves to be identified. Rule 73(2)(d) says that a ballot paper shall be invalid on which "there is any mark or writing by which the elector can be identified." The applicability of this Rule came up for consideration before a Bench of five learned Judges of the Supreme Court in DR. ANUP SINGH v. ABDUL GHANI (AIR, 1965 SC 815). The Supreme Court laid down the following two conditions for declaring a ballot paper invalid under Rule 73(2)(d) :

(i) There should be a mark or writing on the ballot paper other than what is permitted by Rule 37A : and

(ii) There should be reasonable probability of identification by the mark or writing."

The mark in the impugned ballot papers Exs. C2, C3 and C4 is the figure 1 which is permitted by Rule 37A and condition No. 1 itself is not satisfied. By this mark there is no reasonable probability of the identification of the elector. In the unreported decision of the single Judge of the Lucknow Bench of the Allahabad High Court in SHARADAA DEVI v. K. C. Pant (Election Petitioner No. 2/78 dated 7-4-1983) already referred to, the learned Judge has held that the ballot paper in which the preferences were marked opposite the name of the candidates of his choice in the columns of the left hand side of the vertical line is not invalid under Rule 73(2)(d). For the foregoing reasons, I find that Exs. C2, C3 and C4 do not come within the mischief of Rule 73(2)(d) of the Conduct of Elections Rules.

35. In the result, I hold that the Returning Officer has rightly held Exs. C2, C3 and C4 valid and this issue is also answered against the petitioner.

36. ISSUE No. 3 :—It is the contention of the petitioner that he applied for recounting of all the ballot papers during the counting, but the Returning Officer improperly turned down the request in spite of the mandatory provisions of Rule 82(1) of the Conduct of Elections Rules. Ex. R2(b), is the petition and Ex. R.2 (c) is the order of the Returning officer in which the Returning Officer has preferred to Rule 73(3)(iv) which is a obvious mistake for Rule 71(4) of the Conduct of Elections Rules. The only ground on which recount has been asked for in Ex. R2(b) is that the 3 ballot papers in which the figure 1 is not marked in the column on the right hand side of the vertical line are invalid. The Returning Officer has already over ruled this objection in his order under Ex. R2(d) and there was, therefore, no necessity to order any recount. No new ground for recounting has been urged before him. It is not the case of the petitioner either before the Returning Officer or even in the Election Petition that any other ballot paper is invalid on any other ground or that there was any mistake in counting and hence, there was no purpose in ordering recount. The request has rightly been rejected by the Returning Officer and Rule 82 of the Conduct of Elections Rules cannot be said to have been violated. This issue is also found against the petitioner.

37. In the result, the election petition fails and is dismissed with costs of Rs. 500 for each of the respondents 1 to 5, who are the contesting returned candidates.

Witness the Hon'ble THIRU MADHUKAR NARHAR CHANDURKAR CHIEF JUSTICE AT MADRAS the aforesaid this 24th day of April, 1987.

Sd/- H. RADHA, II Assistant Register P(OS)

Certified to be a true copy.

Dated this 25th day of June, 1987.

Sd/- (Illegible)
For MANAGER (OS).

ELECTION PETITION NO. 1/1986.
JUDGMENT DATED : 24/4/1987.
THE HON'BLE MR. JUSTICE S. A. KADER

नई दिल्ली, 21 अगस्त, 1987

आदेश

आ० अ० 100:—निर्वाचन आयोग का समाधान हो गया है कि 13- बहौर (अ.जा.) सभा निर्वाचन-क्षेत्र में 1987 में हुए पांडिचरी विधान सभा के उप-निर्वाचन के लिए निर्वाचन लड़ने वाले अभ्यर्थी श्री एम० नदनकंधन, कुडुचो इस्लम, थोक्वातूर सलाई, अयानर नगर, पांडिचरी, लोक प्रतिनिधित्व अधिनियम, 1951 तथा तद्दीन बनाए गए नियमों द्वारा यथा अपेक्षित अपने निर्वाचन व्ययों का कोई भी लेखा दाखिल करने में असफल रहे हैं;

और उक्त अभ्यर्थी ने सम्यक् सूचना दिए जाने पर भी उक्त असफलता के लिए कोई कारण अथवा स्पष्टीकरण नहीं दिया है और निर्वाचन आयोग का यह समाधान हो गया है कि उनके पास उक्त असफलता के लिए कोई पर्याप्त कारण या न्यायोचित्य नहीं है;

अतः अब निर्वाचन आयोग, उक्त अधिनियम की धारा 10-क के अनुसरण में, श्री एम० नदनकंधन को संसद के किसी भी सदन के या किसी राज्य/संघ राज्य क्षेत्र की विधान सभा अथवा विधान परिषद् के सदस्य चुने जाने और

होने के लिए इस आदेश की तारीख के तीन वर्ष की कालावधि के लिए निहित घोषित करता है।

[पांडि-वि. म./13/87 (उप)]

अदेश से,

सी. एल. रोज, सचिव

New Delhi, the 21st August, 1987

ORDER

O.N. 100.—Whereas the Election Commission is satisfied that Shri C. Nadankanthan, Kurunchi Illam, Thiruvalluvar Salei, Iyyanar Nagar, Pondicherry, a contesting candidate for the bye-election to the Pondicherry Legislative Assembly

held in 1987 from 13-Bahour (SC) Assembly Constituency has failed to lodge the account of his election expenses at all as required by the Representation of the People Act, 1951 and the Rules made thereunder ;

And, whereas, the said candidate has not furnished any reason or explanation for the said failure even after due notice and the Election Commission is further satisfied that he has no good reason or justification for the said failure ;

Now, therefore, in pursuance of section 10A of the said Act, the Election Commission hereby declares Shri S. Nadakanthan to be disqualified for being chosen and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State for a period of 3 years from the date of this Order.

[No. POND-LA/13/87-(Bye)]

By Order,

C. L. ROSE, Secy.

